



**Mwangi v Moseti (Civil Appeal E215 of 2020)
[2024] KEHC 12001 (KLR) (Civ) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E215 OF 2020**

**JM OMIDO, J
OCTOBER 1, 2024**

BETWEEN

PETER MWANGI APPELLANT

AND

WISLEY ATANDI MOSETI RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. A.N. Makau, Principal Magistrate delivered on 4th September, 2020 in Nairobi Milimani CMCC No. 7616 of 2016.)

JUDGMENT

1. The Appellant, Peter Mwangi has brought this appeal, being aggrieved by the decision of the Chief Magistrate's Court (Hon. A.N. Makau, Principal Magistrate) delivered on 4th September, 2020 in Nairobi Milimani CMCC No. 7616 of 2016, against the Respondent, Wisley Atandi Moseti, challenging the judgement and decree issued therein.
2. The matter before the lower court was a tortious liability claim in which the Respondent (the Plaintiff in the lower court) sought for compensation against the Appellant for bodily injuries that he sustained in a road traffic accident that occurred on 1st September, 2016.
3. Judgement on liability in the lower court was entered in favour of the Respondent at 100% against the Appellant and the court proceeded to assess general damages for pain, suffering and loss of amenities at Ksh.800,000/- and special damages at Ksh.550/-. The Respondent was also awarded costs of the suit and interest.
4. The Appellant has presented the following grounds of appeal vide the Memorandum of Appeal dated 21st September, 2020:



1. That the learned Magistrate erred in law and in fact in finding the Appellant negligent and liable for the accident contrary to the facts and evidence of the case.
2. That the learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions on the issue of liability/negligence and thereby making a wrong judgement.
3. That the learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions on quantum of damages and authorities cited and entirely relied on that of the Respondent thereby making a wrong judgement.
4. That the learned Magistrate erred in law and in fact in awarding the Respondent general damages to the amount of Ksh.800,000/- for pain, suffering and loss of amenities.
5. This court directed that the appeal proceeds by way of written submissions and both parties complied by filing their respective submissions.
6. This being the first appellate court, I am required under Section 78 of the Civil Procedure Act and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
7. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
8. Going to the matter before the trial court, the Respondent presented the suit vide an amended plaint dated 25th April, 2019. The Respondent's claim was resisted by the Appellant vide an amended statement of defence dated 13th May, 2019.
9. The Respondent called Dr. Salim Juma who testified and produced a medical report that was prepared by Dr. Konya W.P., dated 4th October, 2016. As per the report, Dr. Konya examined the Respondent and noted that he had sustained the following injuries: Loss of consciousness. Bruises on the frontal arm. Bruises on the right-hand dorsum. Tenderness of the right knee. Fracture of the medial condyle right knee.
10. In his testimony, PW1 stated that at the time of examination, the Respondent had difficulty in walking.
11. The Respondent testified before the lower court as PW2 and adopted the contents of his witness statement dated 28th October, 2016. He told the court that he was on 7th September, 2016 at about 11am lawfully walking as a pedestrian along the Southern Bypass when he was hit from behind by motor vehicle registration number KBW 481L that belonged to the Appellant, as a result of which he sustained injuries and was taken to hospital for treatment.
12. The Respondent blamed the driver of the vehicle for causing the accident. He stated that the accident was reported to Lang'ata Police Station.



13. Upon being cross-examined, the Respondent denied having been crossing the road when the accident occurred. He stated that he lost consciousness and was taken to hospital for treatment.
14. The Respondent produced the hospital referral letter dated 1st September, 2016.
15. Corporal Fredrick Kwete of Karen Police Station testified as PW3 and told the trial court that the subject road traffic accident occurred on 1st September, 2016 along the Southern Bypass between Lang'ata and Karen areas.
16. The officer told the court that the accident involved motor vehicle registration number KBW 481L Toyota Rav 4 that was being driven by the Appellant, who was also the owner, and the Respondent, who was a pedestrian along the Bypass. The witness stated that the Appellant also reported the accident to the police on 1st September, 2016.
17. The witness produced the following documents in support of the Respondent's case: Police abstract. P3 form.
18. The Appellant testified DW1 and adopted the contents of his statement that was recorded on 23rd May, 2017 as his testimony before the trial court. He told the lower court that on 1st September, 2016, he was driving along the Southern Bypass when three men, among them the Respondent, emerged while running from the right side. He stated that the Respondent attempted to cross the road while trying to confuse the Appellant with an unclear motive and was pushed by the Appellant's car when he hung onto the vehicle's small side mirror. He stated that he could not have avoided the accident as it occurred abruptly.
19. The Appellant told the trial court that he stopped but when he realized that the other two men would possibly attack him, he got back into his vehicle and sped off. Other motorists also sped off. He thereafter took a taxi back to the scene but did not find the Respondent and his colleagues. He reported the matter to Karen Police Station and was issued with an OB report and a police abstract.
20. The Appellant blamed the Respondent and the other two men for the accident stating that their motive on the road was suspect.
21. Having considered the record of the lower court and the present record, I discern the issues for determination in the present appeal to be as follows:
 - a. Whether the trial court reached the proper finding on the issue of liability.
 - b. Whether the assessment and award of general damages for pain, suffering and loss of amenities by the trial court was manifestly and/or excessively high.
22. With regard to the first issue for determination which concerns the trial court's finding on liability, it was not disputed in the lower court that the accident occurred and that the Respondent was injured after being hit by the Appellant's motor vehicle.
23. The lower court record bears it that after considering and analyzing the evidence adduced by both sides, the learned trial Magistrate rendered herself as follows, on liability:

“I have given due consideration to the pleadings by both parties, the evidence adduced by the Plaintiff and his witnesses. I find it evidently clear that an accident occurred involving the Plaintiff and the Defendant's motor vehicle herein.

The Plaintiff blames the Defendant for knocking him down from behind and causing him serious injuries. The Defendant confirmed that the accident occurred but stated not to have



been able to avoid it because it happened so suddenly. The court takes note of the time of the day when the accident occurred, it also takes into account the nature of the road and how busy it was. The Defendant said it was lonely that means the road was not busy; it had less traffic. He did not however state why he was unable to control the vehicle and avoid hitting the Plaintiff who stated to have been walking besides the road. He did not deny knocking him from behind but failed to state why he knocked him or what hindered the Defendant from seeing the Plaintiff. The evidence therefore is that the Defendant knocked the Plaintiff because he could not control his vehicle. He drove at a speed or in a manner that he could not control the vehicle in case of an eventuality and in the circumstances, he carries the blame. As such, he bears liability at 100%.”

24. As can be seen from this court’s analysis of the evidence as extracted from the lower court’s record, the only witnesses who were present at the scene of the accident were the Appellant and the Respondent.
25. The Respondent blamed the Appellant for the accident stating that he was hit from behind while he was off the road. The trial court noted that the Appellant’s evidence indicated that the area was lonely, which meant that the section of the road was not busy and that in the circumstances, the Appellant ought to have been able to control the vehicle and avoid hitting the Respondent who stated to have been walking besides the road.
26. On the part of the Appellant, the evidence was that he was driving at about 50Kph when the Respondent and his confederates emerged onto the road so abruptly that he was unable to avoid the accident. He stated that the vehicle hit the Respondent with its side when he hung onto the side mirror.
27. From the lower court record, the learned trial Magistrate reached the finding that the Appellant was driving at at a speed or in a manner that he could not control the vehicle in case of an eventuality.
28. The trial Magistrate, upon analyzing the evidentiary material available reached the position that the Appellant was wholly negligent. I am however of the view that the Respondent, albeit to a lesser extent, contributed to the accident by his inactiveness. He did not tell the trial court the manner in which he acted in an attempt to try and avoid the accident.
29. This court appreciates that an appellate court will not ordinarily interfere with findings of fact by a trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. I opine thus that this case presents a situation that warrants the interference of the court’s finding on liability as I have reached the persuasion that the Respondent contributed to the accident. In my view, the Respondent ought to have borne 20% blame.
30. With regard to the second issue for determination which is whether the assessment and award of general damages for pain, suffering and loss of amenities by the trial court was manifestly and/or excessively high, the law on when an appellate court can interfere with an award of damages is firmly established.
31. General damages are awarded if the party claiming establishes in principle his legal entitlement to the same, and the trial court must make its own assessment of such general damages.
32. In order to justify interfering with the award of damages made by the court that assessed the same, this court must be convinced that the trial Magistrate acted upon some wrong principle of law, or that the amount awarded was manifestly or excessively high or low as to render the same an erroneous estimate of the compensation for the injuries sustained by the party. (See *Rook v Rairre* [1941] 1 ALL ER 297).



33. In Butt v Khan [1981] KLR 349 the Court of Appeal observed as follows;

“ An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate.

It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

(See generally Southern Engineering Company Ltd v Mutia [1985] eKLR; Kenfro Africa Ltd t/a Meru Express Services v Lubia & Another (No 2) [1985] eKLR and Gicheru v Morton & Another [2002] KLR 333).

34. From the trial court’s judgement, the learned Magistrate took guidance from decisions of superior courts in which comparable injuries were assessed and, in my view, properly proceeded to assess the same at Ksh.800,000/-. This court will not interfere with the assessment.

35. The upshot then is that I will allow the appeal in part and set aside the lower court’s finding on liability and substitute therefore with the finding that the Appellant (the Defendant in the lower court) bears 80% liability and the Respondent (the Plaintiff in the lower court) bears 20% liability.

36. It then follows that quantum shall be as follows:

- General damages for pain, suffering and loss of amenities:....Ksh.800,000/-

Less 20% contribution:Ksh.160,000/-

Net.....Ksh.640,000/-

- Special damages.....Ksh.550/-

Less 20% contribution.....Ksh110/-

Net.....Ksh.440/-

37. As the appeal is only partly successful, each party shall bear their own costs on the appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 1ST DAY OF OCTOBER, 2024.

JOE M. OMIDO

JUDGE

FOR APPELLANT: Ms. Kamau.

FOR RESPONDENT: Ms. Ndwiga holding brief for Mr. Momanyi.

COURT ASSISTANT: Ms. Njoroge.

Ms. Kamau: I seek stay for 30 days. We shall use that period to settle by accessing the cash that was deposited in a joint interest earning account as security.

Ms. Ndwiga: No objection.

Court: There shall be stay of execution for 30 days.

JOE M. OMIDO

JUDGE

